2016

Criterium, LLC, a Utah Limited Liability : Company, Plaintiff/ Appellant, v . Homeowners Association of Rockwell Square, Inc., a Utah Nonprofit Corporation; Et Al., Defendants I Appellees .

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

CRITERIUM, LLC, a Utah limited liability company, Plaintiff / Appellant, v. **HOMEOWNERS ASSOCIATION OF ROCKWELL SQUARE, INC.**, a Utah nonprofit corporation; et al., Defendants / Appellees.	**REPLY BRIEF**
HOMEOWNERS ASSOCIATION OF ROCKWELL SQUARE, INC., a Utah nonprofit corporation; et al., Counterclaimants, v. **CRITERIUM, LLC**, a Utah limited liability company, Counterclaim Defendant.	No. 20150833-CA

Appeal from a Final Order of the Third Judicial District Court,
Salt Lake County, State of Utah
Honorable Royal I. Hansen

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In its initial brief, Criterium has already addressed many of the arguments that Apprellees raise in their Brief of Appellees ("**Appellees' Brief**"). Rather than repeat the contents of its initial brief, Criterium refers the court to those portions of its initial brief and addresses in this reply only those points of Appellees' Brief that Criterium's initial brief may not have adequately addressed.

I. APPELLEES' "FACTUAL" ASSERTIONS ARE UNRELIABLE AND UNSUPPORTED BY THE RECORD ON APPEAL.

Appellees' Statement of the Case and Statement of the Facts, as well as other assertions of "fact" in Appellees' Brief, are unreliable. They contain multiple inaccuracies unsupported by the record on appeal as UTAH RULE OF APPELLATE PROCEDURE 11 defines it (the "**Record**"), as well as baseless accusations, legal conclusions, and mere speculation erroneously characterized as "facts."

A. THIS IS NOT A "BREACH OF CONTRACT" ACTION. Appellees' Brief repeatedly and incorrectly characterizes this action as one for "breach of contract". Criterium has never argued that the Association has "breached" a provision of the Declaration or any other contract,[1] and has filed nothing with the district court or with this Court that even contains that phrase.

This action is and has always been a declaratory judgment action involving the effect of the Utah Condominium Act (the "**Act**") on the Declaration. Critierum argued below and argues on appeal that certain provisions of the Declaration conflict with the

Act, both before and after the 2016 Revisions, and that the Act controls and is binding on the Appellees. The disposition of this case will be determined largely by the Court's interpretation of the Act, both as it existed prior to the 2016 Revisions and after.

B. CRITERIUM APPEALED ALL OF THE DISTRICT COURT'S ORDERS, NOT JUST ITS FINAL JUDGMENT. Contrary to Appellees' assertions at various points in Appellees' Brief, Criterium's Notice of Appeal specifically recited that Criterium appealed every order the district court entered: "The appeal is taken from the entire Final Judgment and from all prior orders and judgments in this matter."[2] In fact, Criterium's appeal would have been of every intermediate order the district court entered even if Criterium had not included this language.[3]

C. CRITERIUM DID NOT PURCHASE "VACANT LAND". Appellees' Brief recites at page 2 that Criterium "purchased a tract of vacant land" and at page 5 that Criterium "is the owner of record of certain undeveloped land adjacent to Building 1." At pages 5 and 9 Appellees refer to Criterium as a "landowner" and make references to

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[1] Criterium did assert a "breach" of certain defendants' fiduciary duties to Criterium. (Record ("**R.**") 11). That claim, however, was based in the common law, not contract.

[2] *See* R. 1104. Any notice of appeal that contains words such as "all preceding or interim orders" is sufficient to constitute an appeal of intermediate orders and events; in fact, the UTAH RULES OF APPELLATE PROCEDURE "do[] not require that an appellant indicate that the appeal also concerns intermediate orders or events that have led to that final judgment." *Young v. Fire Insurance Exchange*, 2008 UT App 114, ¶ 21 & n.4, 182 P.3d 911.

[3] *See, e.g., North Fork Special Services Dist. v. Bennion*, 2013 UT App 1, ¶ 18, 297 P.3d 624 ("[T]he relevant inquiry is whether the prior orders not named in [a] notice of appeal were intermediate orders that led to a final, appealable order. Where the intermediate order of the court constitutes one link in the chain of rulings leading to dismissal, [an

the "land [Criterium] purchased." These statements are incorrect and misleading. Criterium did *not* purchase vacant land. Indeed, if that were the case, this litigation would never have been initiated, because Criterium would have simply developed the land it had acquired. Criterium actually purchased 134 unconstructed condominium units[4] comprising approximately 80% of the aggregate square footage of all the units created by the Declaration and the Plat.[5] The vacant land to which Appellees refer is the land underlying the Criterium Units as shown on the Plat, which land is part of the common areas of Rockwell Square. Understanding this point is critical to understanding this case.

Once a condominium regime has been created by the recordation of a declaration and a plat, the property described in the declaration and depicted on the plat is legally subdivided into, and consists entirely of, condominium units and common areas. The common areas, which include the land underlying the units, are owned by all the unit owners as tenants in common, with each owning an undivided interest allocated to the unit in one of the three methods allowed by the Act. All the land underlying Rockwell Square, including the vacant land, is common area.[6]

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appellant] is entitled to challenge it based on a notice of appeal identifying the final order.") (citations and internal quotations omitted).

[4] *See* R. 662-668.

[5] *See* Declaration, Exhibit E (R. 110-113) (included as part of Addendum ("**Add.**") A to Criterium's initial brief).

[6] *See* Declaration § 1.01 (R. 38) (included as part of Add. A to Criterium's initial brief).

D. **APPELLEES' PROCEDURAL HISTORY IS INCOMPLETE OR BEYOND THE RECORD.** Appellees' statements regarding the procedural history of the case are not entirely accurate and are unsupported by the Record. Critierum refers the Court to the procedural background at pages 8-10 of Criterium's initial brief, which is supported by references to the Record.

E. **CRITERIUM HAS NOT "ABANDONED" THE ARGUMENTS CRITERIUM MADE TO THE DISTRICT COURT.** Contrary to Appellees' assertions at pages 3-4 of Appellees' Brief, Criterium expressly argued in pages 27-41 of its initial brief that the district court erred in concluding that unconstructed units do not constitute units under both the Act as it existed before the 2016 Revisions and the express language of the Declaration, and that this Court should reverse the district court's ruling on that basis. In addition, however, Criterium makes the additional argument – unavailable to it at the time this matter was before the district court – that the 2016 Revisions are also dispositive of this appeal.

F. **MANY OF APPELLEES' CLAIMED "FACTS" ARE LEGAL ARGUMENT.** For example, Appellees' Fact Statement No. 1 at page 4 of Appellees' Brief asserts that the units purchased by Criterium "do not exist now and will never exist." That is not a fact; it is an incorrect legal conclusion. Likewise, Appellees' Fact Statement No. 6 on the same page improperly includes a legal conclusion (rather than a fact) that Criterium can be a member of the association only to the extent that it is subject to assessments.

In Appellees' Fact Statement No. 2, Appellees purport to know the declarant's purpose in failing to allocate undivided interests in the common areas to unconstructed

units. This is mere speculation, without any basis in the Record. No evidence was introduced in the District Court as to the intent of the Declarant, and it is at least as, if not more, likely that the Declarant was simply trying to avoid paying assessments for unconstructed units.

In Fact Statements No. 7, No. 12, and No. 13 at pages 5-6 of Appellees' Brief, Appellees accuse Criterium of "failing" to pay assessments associated with its "recent" assertion that it is entitled to membership interests in the association, to participate in the Association, or to claim any interest in the common areas. None of these accusations is accurate or supported by the Record. Criterium's assertions that it is entitled to membership in the Association are not "recent", and Criterium has not "failed" to pay assessments or to exercise its rights as a unit owner and a member of the Association. Rather, at all times relevant to this case, despite Criterium's requests, the Association refused to allow Critierum to exercise those rights.

G. APPELLEES BASE MUCH OF THEIR ARGUMENT OF DOCUMENTS OUTSIDE THE RECORD. In their Summary of Argument, Appellees allege new "facts" occurring after the passage of the 2016 Revisions, including assertions that since the 2016 Revisions, Appellees have, among other things, levied an "appropriate assessment" against Criterium and offered Criterium the right to membership in the Association and voting based on Criterium's interest in the common areas.

All these assertions are outside the Record, and UTAH RULE OF APPELLATE PROCEDURE 24(a)(9) "mandates that a party's brief 'shall contain the contentions and reasons of the appellant with respect to the issues presented . . . with citations to the

authorities, statutes, and *parts of the record relied on.*'"[7] Furthermore, these statements are simply not true.[8] Appellees' allegations regarding payment of assessments are likewise improper and inaccurate, and Criterium addresses that issue below.

Importantly, there is a critical distinction between the ***private*** extra-Record "facts" that Appellees improperly allege in Appellees' Brief and the exclusively ***public*** post-appeal legislative history and 2016 Revisions that Criterium referred to in its initial brief. Indeed, Rule 24(a)(9) distinguishes between "statutes", on the one hand, and "parts of the record", on the other.

II. THE PROVISIONS OF THE DECLARATION THAT PURPORT TO DENY THE BENEFITS OF UNIT OWNERSHIP TO THE OWNERS OF UNCONSTRUCTED UNITS VIOLATE THE CONDOMINIUM ACT AND ARE INVALID.

Appellees argue at page 11 of Appellees' Brief that a declarant's right to freedom of contract allows a declarant to include provisions that do not comply with the Act. This argument is simply incorrect. A condominium form of subdivision and ownership cannot exist outside the Act. A condominium can be created only by submitting the

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[7] *State v. Hawkins*, 2016 UT App 9, ¶ 63, 366 P.3d 884 (emphasis in original).

[8] To the extent the Court concludes Appellees' argument concerning post-appeal communications among the parties is relevant to the issues before the Court, Criterium replies that in fact, by an email dated May 26, 2016, the Association demanded payment from Criterium in the amount of $321,112.88, which the Association claimed would be approximately 80% of the common expenses dating back to the date on which the Declaration was recorded. By a letter dated June 6, 2016, the Association expressly refused to allow Criterium to exercise its voting rights unless Criterium first paid the amount demanded by the Association. This does not constitute an "appropriate assessment" or an offer to recognize Criterium's rights. It is inappropriate for this Court to address either of these two competing factual narratives, both of which are appropriate for further action at the trial court level.

condominium property to the Act. Pages 15-18 of Criterium's initial brief contain a sufficient argument to this effect.

Once a condominium project has been submitted to the Act, the declarant, the owners' association, and the unit owners are bound by the mandatory provisions of the Act. They do not have "freedom of contract" allowing them to act in violation of those provisions.

III. THE CRITERIUM UNITS ARE CONDOMINIUM UNITS UNDER THE DECLARATION AND THE PRE-2016 ACT AND ARE ENTITLED TO AN ALLOCATION OF COMMON AREA INTERESTS AND VOTING RIGHTS PROPORTIONATE TO THEIR RELATIVE SIZES.

A. THE DEFINITION OF "UNIT" IN THE DECLARATION INCLUDES BOTH CONSTRUCTED AND UNCONSTRUCTED UNITS. Pages 40-44 of Criterium's initial brief contain a sufficient reply to Appellees' argument regarding the definition of "Unit" in the Declaration and in the Act, including the proper interpretation of the term "physical" as used in reference to a unit. The Criterium Units are Units as that term is used in the Declaration.

B. THE PRE-2016 ACT REQUIRES THAT ALL UNITS, INCLUDING UNCONSTRUCTED UNITS, BE ALLOCATED UNDIVIDED INTERESTS IN THE COMMON AREAS. Pages 27-40 of Criterium's initial brief contain a sufficient reply to Appellees' argument regarding the definition of "unit" in the pre-2016 Act, including Appellees' argument regarding the application of existing case law to the determination of what constitutes a "Unit" in Rockwell Square.

Appellees contort beyond recognition this Court's statement in *B. Investment LC v. Anderson*[9] that *Country Oaks Condo. Mgmt. Comm. v. Jones*[10] affords declarants a "'measure of latitude' in drafting the provisions of the Declaration." This Court merely stated in *B. Investment* that the Act affords a measure of latitude *in defining a unit*. This Court did not say that a declarant has the latitude to ignore the Act's mandatory provisions.

Appellees similarly misconstrue the provision of the Act regarding allocation of common area interests to every unit by quoting only a portion of the applicable language. Section 57-8-7 of the Act provides, in relevant part:

> ***Each unit owner*** shall be entitled to an undivided interest in the common areas and facilities in the percentages or fractions expressed in the declaration. The declaration may allocate ***to each unit*** an undivided interest in the common areas and facilities proportionate to either the size or par value of the unit. Otherwise, the declaration ***shall*** allocate to each unit an equal undivided interest in the common areas and facilities . . . . (emphasis added).

By omitting the last sentence from this provision in their brief, Appellees hope the Court will not recognize the mandatory nature of this provision. When read in its entirety, section 57-8-7 explicitly requires that every unit owner be allocated an undivided interest in the common areas. The only discretion allowed to a declarant is in the selection of the ***method*** of allocation. The declarant ***may*** allocate interests to be either (i) proportionate to relative unit size, or (ii) proportionate to the relative par values

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[9] 2012 UT App 24, ¶ 19, 270 P.3d 548.

[10] 851 P.2d 640 (Utah 1993).

assigned to the units; but if the declarant does not select one of those two methods, the declaration ***shall*** allocate interests equally among the units. Pages 39-40 of Criterium's initial brief contain a sufficient discussion of this provision and its application to this case.

C. APPELLEES' SPECULATION REGARDING THE INTENT OF THE DECLARANT CANNOT PREVAIL OVER CONFLICTING PROVISIONS OF THE ACT. Appellees argue at page 12 of Appellees' Brief that the intent of the declarant should be (i) controlling in interpreting the Declaration, and (ii) ascertained from the Declaration itself. This argument fails for a number of reasons. *First*, the intent of the declarant cannot nullify the mandatory provisions of the Act. *Second*, Appellees cite no Record evidence regarding their argument that the declarant either did, or intended to, exclude unconstructed units from the Declaration's own definition of "Unit". The Record, including the Declaration, contains no evidence of what the declarant may have thought or intended with respect to this issue, and Appellees' attempted reconstruction of those extra-Record historical events is incompetent speculation.

The Declaration does, however, contain an express statement of the declarant's intention that the Declaration comply with the Act. Section 2.03, entitled "Statement of Intention", reads in its entirety: "The condominium project to be created on the Land is hereby created pursuant to and shall be governed by the provisions of the Act."[11] The only intent of the declarant unambiguously expressed in the Declaration is the intent to comply with the Act.

D. THE CRITERIUM UNITS HAVE EXISTING SIZES, STATED IN THE DECLARATION, AND ARE ENTITLED TO AN ALLOCATION OF COMMON AREA INTERESTS AND VOTING RIGHTS BASED ON THOSE SIZES. Appellees argue at page 14 of Appellees' Brief that the sizes of the Criterium Units cannot be determined unless they are actually constructed, and that the "drafters of the Declaration determined that interests in the common areas would be allocated proportionate to the actual constructed size of the units." Again, Appellees demonstrate a fundamental misunderstanding of condominiums. Section 57-8-10(2)(a) requires that "[f]or every condominium project, the declaration shall . . . contain the unit number of each unit, the square footage of each unit, and any other description or information necessary to properly identify each unit." This provision of the Act requires that the square footage of each condominium unit in a new condominium project be specified in the declaration creating the units, which must be recorded *prior to construction or conveyance of any unit.*

The requirement in the 2016 Revisions that undivided interests in the common areas and voting rights be allocated to unconstructed units[12] shows that the 2016 Utah Legislature did not agree with the district court's rulings or Appellees arguments in support of those rulings.

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[11] *See* Declaration § 2.03 (R. 44) (included as part of Add. A to Criterium's initial brief).

[12] UTAH CODE § 57-8-24.

Contrary to Appellees' assertions, Exhibit E attached to the Declaration specifies the size of each of the Criterium Units.[13] No speculation is necessary to determine the sizes of the Criterium Units for purposes of allocating common area interests and voting rights.

IV. A UNIT OWNER'S OBLIGATIONS FOR PAYMENT OF COMMON EXPENSES DO NOT COMMENCE UNTIL COMMON AREA INTERESTS AND VOTING RIGHTS HAVE BEEN ALLOCATED TO THE UNIT OWNER, AND THAT ALLOCATION CANNOT BE RETROACTIVE.

In the Summary of the Argument at page 7 of Appellees' Brief, Appellees assert that Criterium is attempting to "claim an interest in the common areas" while refusing "to pay their proportionate share of the common expenses of the Association." Again, Appellees mischaracterize Criterium's argument. Criterium has never argued that it is entitled to voting rights and an allocation of undivided interests in the common areas with no corresponding assessment obligations.[14] Rather, Criterium's position is that no assessment obligation can exist until the Association allocates undivided interests and

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[13] *See* Declaration, Exhibit E (R. 110-113) (included as part of Add. A to Criterium's initial brief).

[14] *See, e.g.*, Criterium's June 12, 2014 Memorandum in Opposition to Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure at page 11) (R. 400) ("Criterium has never argued that it is not subject to assessment for its proportionate share of common expenses. Criterium has never received an assessment notice from the Association. Indeed, assessment of Criterium by the Association would constitute an admission by the Association that Criterium owns undivided interests in the common area and is entitled to voting rights proportionate thereto. The fact that Criterium has not paid assessments to the Association does not constitute evidence of anything other than the failure of the Association to recognize Criterium as an owner of units and a member of the Association.")

voting rights to Criterium and allows Criterium to exercise those rights, which the Association has not done.

Appellees' argument that Criterium's liability should be retroactive is inequitable because it is impossible for Criterium to retroactively exercise its various rights. It would be inequitable for the Association and the Building 1 Owners to willfully deny Criterium's rights as an owner, depriving Criterium of the benefits that come with exercising those rights, and then receive all the financial benefits that would have accrued to Appellees had they afforded Criterium those rights from the beginning. Condominium owners are required to pay assessments in exchange for the rights and benefits they receive in return. Criterium has been denied those rights and benefits.

The rights that Appellees have wrongfully denied Criterium include the rights of every condominium unit owner to monitor and participate in the financial decisions of the owners association.[15] As members of the owners association, unit owners have the right to examine the association's financial records to ensure that association funds are being used appropriately and to have input with respect to the association's spending decisions through election of management committee members, budget approval, and voting on other financial matters considered by the members. Criterium has been denied those rights, and it would be unjust to place on Criterium the responsibility for financial

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[15] *See, e.g.,* UTAH CODE §57-8-17 (2016) (giving unit owners the right to examine records of receipts and expenditures); UTAH CODE §16-6a-1602 (2016) (giving members of a nonprofit corporation the right to examine records of the corporation) and Section 4.04 of the Declaration (giving owners the right to inspect "books, records, budgets, and financial statements of the Association").

decisions with respect to which Criterium was not allowed the input to which every owner is entitled.

More importantly in this case, if Appellees had recognized Criterium's rights from the beginning, Criterium would have used its voting rights to amend the Declaration and the Plat to allow economically viable development of the unconstructed portion of Rockwell Square. Instead, Appellees' refusal to recognize Criterium's rights prevented Criterium from taking action to realize the value of its purchase of the Criterium Units. If any assessment obligations accrued during that period of time, the amount of those obligations simply becomes a setoff against Criterium's damages resulting from Appellees' wrongful actions described in this litigation.

Criterium has expressly recognized that assessment obligations will accrue with respect to the Criterium Units from and after the date on which the Association recognizes Criterium's rights as a unit owner and allows Criterium to exercise those rights. Any imposition of assessment obligations for the period during which the Appellees have denied Criterium's rights as a unit owner, however, would reward Appellees' wrongful actions and require Criterium to pay for rights it did not have and benefits it did not receive.

V. THE 2016 REVISIONS TO THE UTAH CONDOMINIUM OWNERSHIP ACT DO APPLY TO THIS CASE.

It is important for the Court to recognize from the outset that Appellees agree with Criterium regarding the effect of the 2016 Revisions:

> Under the 2016 Amendment, ***the new provisions of the Act are applicable to the Declaration, even though the Declaration was recorded before the***

> ***2016 Amendments were enacted.*** Therefore, under the current law, Criterium does have an allocated interest in the common areas and is liable for its proportionate share of common expenses. . . . ***[N]ow that all the parties agree with respect to the new law that was enacted by the legislature in 2016***, then Criterium will need to file a new lawsuit with new factual allegations based on that new law and the new position of the parties. However, the new law can't be applied retroactively to change the outcome of cases that have already been decided under prior law and the facts as they existed at the time of the complaint, as fixed at the time of summary judgment.[16]

Appellees' concession that the 2016 Revisions have the effect that Criterium claims leaves retroactivity as the only aspect of the 2016 Revisions requiring judicial resolution.[17]

In arguing the 2016 Revisions are not retroactive, Appellees first take the position at pages 18-19 of Appellees' Brief that Utah law "require[s] that the version of the Act in Effect at the time this claim was filed governs this appeal",[18] and that "parties' substantive rights and liabilities are determined by the law in place at the time when a cause of action arises."[19] Neither of these two quotations is an accurate statement of the legal principles that govern the retroactivity analysis in this appeal.

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[16] Appellees' Brief, pages 7-8 (emphasis added).

[17] This is not to say that retroactivity of the 2016 Revisions is the only issue requiring resolution on appeal. The issues Criterium raised in its initial brief regarding *Country Oaks Condo. Mgmt. Comm. v. Jones*, 851 P.2d 640 (Utah 1993) and *B. Investment LC v. Anderson,* 2012 UT App 24, 270 P.3d 548 raise a separate basis for reversing the district court based on the law as it existed on May 12, 2014, when Criterium filed its Complaint. Criterium has addressed the *B. Investment* decision at page 8, above.

[18] Citing *Archer v. Utah State Land Board* 15 Utah 2d 321, 324 392 P.2d 622, 624 (1964).

[19] Citing *Waddoups v. Noorda,* 2013 UT 64, ¶ 6, 321 P.3d 1108.

Plaintiffs' own cited 2015 authority from this Court, *Wasatch County v. Okelberry,*[20] identifies two statute-based exceptions to Appellees' assertion:

> The legislature has declared, "A provision of the Utah Code is not retroactive, unless the provision is expressly declared to be retroactive." Accordingly, the courts of this state operate under a statutory bar against the retroactive application of newly codified laws. ***The general prohibition against retroactive application, however, admits of two exceptions. First,*** an amendment applies retroactively if "the provision is expressly declared to be retroactive." ***Second***, a narrow, judge-made exception to the retroactivity ban" allows that when the purpose of an amendment is to clarify the meaning of an earlier enactment, the amendment may be applied retroactively in pending[21] actions. ***This second exception applies to those narrow circumstances in which the state legislature disagrees with this court's interpretation of a law and attempts to clarify that law's meaning through the amendment process.*** In such circumstances, we apply the law as amended to pending actions. Absent these exceptions, the retroactivity ban holds, and courts must apply the law in effect at the time of the occurrence regulated by that law.[22]

A. THE 2016 REVISIONS ARE EXPRESSLY DECLARED TO BE RETROACTIVE.

Appellees argue at page 20 of Appellees' Brief that no express statutory provision exists

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[20] 2015 UT App 192, 357 P.3d 586, *cert. denied*, 364 P.3d 48 (Utah), *cert. denied sub nom. Okelberry v. Wasatch County*, 2016 WL 3689079 (U.S.) (Mem).

[21] This action has been "pending" at all material times because an action is "deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." *Dep't of Soc. Servs. v. Higgs,* 656 P.2d 998, 1002 (Utah 1982)

[22] *Okelberry*, 2015 UT App 192 ¶ 17 (emphasis added) (citations and internal quotations omitted). In *Okelberry* this Court quoted verbatim a supreme court's opinion that referred to "this court", which could be narrowly read to refer to only the supreme court. However, this court's use of the "this court" phrase in *Okelberry* appears to apply the rule to this Court as well and the phrase accordingly is properly understood as referring to legislative amendments made in response to any court action with which the Utah Legislature disagrees.

in this case because the supreme court opinion in *Waddoups v. Noorda*[23] requires the Utah Legislature to use the past tense if the Legislature wants a statutory provision to be retroactive. The *Waddoups* decision does not have the effect that Appellees claim for it.

In *Waddoups* the Federal District Court for the District of Utah certified a question to the Utah Supreme Court: "Does section 78B-3-425 of the Utah Code clarify existing law and therefore retroactively apply to bar negligent credentialing claims that arose prior to its enactment?"[24] The statute at issue in *Waddoups* (the "**Waddoups Statute**") read: "It ***is*** the policy of this state that the question of negligent credentialing, as applied to health care providers in malpractice suits, ***is*** not recognized as a cause of action."[25] In answering the certified question the supreme court performed a purely textual analysis to conclude the statute was not retroactive:

> This phrase contains no words indicative of retroactive application, nor does any language appear that evinces a clear and unavoidable implication that the statute operates on events already past. ***Both*** of the verbs which appear in the sentence are in present tense: "is" and "is not recognized." It simply cannot be said that the use of the present tense communicates a clear and unavoidable implication that the statute operates on events already past. If anything, use of the present tense implies an intent that the statute apply to the present, as of its effective date, and continuing forward.[26]

Appellees argue that the 2016 Revisions cannot be retroactive because one of the amended portions ("**Section 57-8-24(3)(b)**") reads: "Subsection (3)(a) ***applies*** to a condominium project regardless of when the condominium project's initial declaration

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[23] 2013 UT 64, ¶ 7, 321 P.3d 1108.

[24] *Id.* ¶ 1.

[25] *Id.* ¶ 7 (emphasis added).

was recorded."[27] Seizing on the discussion of verb tense in *Waddoups*, Appellees argue at page 20 of Appellees' Brief that because the word "applies" in Section 57-8-24(3)(b) is in the present tense, the 2016 Revisions cannot be retroactive. This is not a persuasive argument for three reasons.

First, both the Waddoups Statute and Section 57-8-24(3)(b) contain two verbs. The Waddoups Statute reads in pertinent part: "It ***is*** the policy of this state that the question of negligent credentialing, . . . ***is*** not recognized". By contrast, Section 57-8-24(3)(b) replaces its second "is" with the past tense: "was": "Subsection (3)(a) ***applies*** . . . regardless of when the . . . declaration ***was*** recorded."

Second, Appellees ignore this use of the past tense in Section 57-8-24(3)(b) and focus instead on present tense of the first verb in both statutes. However, whereas the Waddoups Statute uses the past tense in both instances and the *Waddoups* court specifically noted in its ruling that ***both*** instances were in the present tense,[28] Section 57-8-24(3)(b) uses the past tense in the second instance.

This is a significant distinction because the first appearance of "is" in a statute will generally if not always be in the present tense because the legislature simply identifies the legislature's intention or declares the new or amended statute's purpose or operation (the announcement of policy in the Waddoups Statute and the application of Section 57-8-24(3)(b) after enactment (which actually is the *future* tense)).

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[26] *Id.* (emphasis added).

[27] UTAH CODE § 57-8-24(3)(b) (2016) (emphasis added).

[28] *Waddoups*, 2013 UT 64, ¶ 7.

Although it might have been possible for the legislature that enacted the Waddoups Statute to have expressly stated by use of the past tense that the policy it identified had in fact been in existence before the legislature's recognition of the fact in the Waddoups Statute; it was not possible for the Utah Legislature – by verb tense or otherwise – to have stated that the 2016 Revisions "appli***ed***" before the legislature enacted them in 2016. *Waddoups* accordingly does not compel the conclusion that the present tense "appli***es***" precludes retroactive application of the 2016 Revisions.

Third, the 2016 Utah Legislature used the second verb tense in Section 57-8-24(3)(b) to make clear that the 2016 revisions "app[y]" to an initial condominium declaration "regardless of when regardless of when the . . . declaration ***was*** recorded." And, Appellees acknowledge that Section 57-8-24(3)(b) applies to the Declaration even though the Declaration was recorded in 2011: "Under the 2016 Amendment, the new provisions of the Act are applicable to the Declaration, even though the Declaration was recorded before the 2016 Amendments were enacted."[29]

As a result of the above, either (i) the language of Section 57-8-24(3)(b) or (ii) Appellees' concession that the 2016 Revisions modified the Declaration satisfies the *Waddoups* court's alternative indication of retroactivity: that the statute contain a "clear and unavoidable implication that the statute operates on events already past."[30] Two years after *Waddoups* the Utah Supreme Court again made this point in different words in

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[29] Appellees' Brief, page 7.

[30] *Waddoups*, 2013 UT 64, ¶ 7.

State v. Steinly:[31] "'[A] law is understood as retroactive if it 'attaches new legal consequences to events completed before its enactment.'"

Both *Waddoups* and *Steinly* establish as the law of Utah that the 2016 Revisions both (i) "operate on" the 2011 Declaration, and (ii) attach new legal consequences to "events completed" in 2011, 5 years "before the enactment" of the 2016 Revisions. This retroactive operation of the 2016 Revisions on the 2011 Declaration provides the "clear and unavoidable" statement that the 2016 Revisions are retroactive.

State v. Perez[32] (an opinion that Appellees cite at pages19 and 21-22 of Appellees' Brief) is in no way contrary to *Waddoups* and *Steinly.* In fact, the supreme court issued its *Steinly* and *Perez* opinions on the same day; Justice Lee wrote both unanimous opinions. In both cases the question was the applicability of May 8, 2012 amendments to a publicly funded defense statute[33] on cases filed or pending around that date; the district court granted both motions for government-funded defense resources - Steinly's (made on June 4, 2012) on the ground that he was entitled to the statute in effect at the time he committed his offense, and Perez' (made in April 2012) on the grounds that he

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[31] 2015 UT 15, ¶ 15, 345 P.3d 1182 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269–70, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994); *see also*, *State v. Perez*, 2015 UT 13, ¶ 13, ¶345 P.3d 1150 (also quoting *Landgraf*).

[32] *State v. Perez*, 2015 UT 13, 345 P.3d 1150.

[33] Both *Steinly* and *Perez* contain an identical explanation that the May 12, 2012 amendments "foreclose[d] an indigent defendant in a criminal action from retaining private counsel while requesting public defense resources from the government. *See* UTAH CODE § 77–32–303(2). They do so by generally conditioning an indigent defendant's eligibility for such resources on the retention of publicly funded counsel." *Steinly*, 2015 UT 15, ¶ 1, *Perez*, 2015 UT 13, ¶ 1.

was entitled to the law in effect at the time he filed his motions.[34] The *Perez* court found the May amendments were not retroactive because in April Perez had exercised "a mature right to indigent defense resources" that the amendments could not take away.[35]

Nothing in the 2012 amendments expressly operated on past events, so based on its conclusion that the amendment affected substantive rights, the supreme court affirmed the district court in *Perez* (became Perez' substantive request came before the effective date of the restrictive amendment), but reversed it in *Steinly* (whose request by contrast came after).

So, although it is true that *Perez* found the 2012 indigent defense amendments not to be retroactive, that outcome is irrelevant to the issues in this appeal because, unlike the 2016 Revisions, nothing in those 2012 amendments purported to "operate[] on events already past"[36] or to "attach[] new legal consequences to events completed before its enactment".[37] Indeed, the *Perez* opinion does not even recite or analyze the language of the amendments at issue because there was no mention of their retroactivity.

On the issue of the ***express*** retroactivity of a statute, however, even though their results differ, *Perez* and *Steinly* adopt the identical rule that "A law is understood as retroactive if it attaches new legal consequences to events completed before its

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[34] *See id.*, ¶¶ 2-3, 15; *Steinly*, 2015 UT 15, ¶¶ 2, 5, 17.

[35] *Perez*, 2015 UT 13, ¶¶ 2, 14.

[36] *Waddoups,* 2013 UT 64, ¶ 7.

[37] *Steinly*, 2015 UT 15, ¶ 15; *Perez*, 2015 UT 13, ¶ 13.

enactment."[38] As a result, even the *Perez* decision that Appellees rely on announces a legal rule that compels the conclusion that Section 57-8-24(3)(b) expressly makes the 2016 Revisions retroactive.

B. THE 2016 REVISIONS WERE THE LEGISLATURE'S RESPONSE TO THE DISTRICT COURT'S RULING IN THIS CASE AND ARE THEREFORE RETROACTIVE. Criterium showed at pages 29-31 of its initial brief that the Utah Legislature enacted the 2016 Revisions in direct response to the trial court's various Rulings and Orders in this case. Appellees do not challenge that fact.

As a result, the second *Okelberry* exception to the statutory bar against retroactive application ("This second exception applies to those narrow circumstances in which the state legislature disagrees with this court's interpretation of a law and attempts to clarify that law's meaning through the amendment process.")[39] applies in this case,[40] and provides an alternative legal basis for applying the 2016 Revisions retroactively.

VI. OVERRULING DECISIONS ALWAYS APPLY TO THE PARTIES TO AN APPEAL.

The general prohibition against retroactivity discussed at pages 14-15, above, applies only to ***statutes***. The rule is the opposite for overruling judicial opinions, where

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[38] *Id.*, *Steinly*, 2015 UT 15, ¶ 15 (citation and internal quotations omitted).

[39] *Okelberry*, 2015 UT App 192, ¶ 17.

[40] *Waddoups*, *Steinly* and *Perez* all contain language repudiating a "freestanding" exception for "clarifying" amendments. *See Waddoups,* 2013 UT 64, ¶ 9; *Steinly*, 2015 UT 15, ¶ 11; *Perez*, 2015 UT 13, ¶ 9. The characterization of the repudiated exception as "freestanding", however, does not affect the rule this Court described later in 2015 in *Okelberry* which, rather than being "freestanding", depends on a express legislative effort to reverse the effect of specific judicial interpretation of a statute in a way that the enacting legislature disagrees with.

"[t]he general rule from time immemorial is that the ruling of a court is deemed to state the true nature of the law both retrospectively and prospectively."[41] As a result of this rule, Utah appellate courts "have long followed the presumption that an alteration of the common law in one of [their] opinions applies retroactively to the parties who seek it."[42]

In this case Appellees neither acknowledge that presumption nor explain why it should not apply to them. That presumption does apply to Appellees and any change of the law resulting from this opinion applies in this case irrespective of what the law may have been when Criterium filed its Complaint in this action.[43]

For all these reasons, the 2016 Revisions, not the law in effect when Criterium filed its Complaint in the trial court, apply to this case.

VII. THIS COURT CAN AND SHOULD REVERSE THE AWARD OF ALL ATTORNEY FEES THE DISTRICT COURT ORDERED.

Page 24 of Appellees' Brief asserts that this Court cannot reverse any attorney-fee award the district court may have made to the Building 1 Owners and the Managers because those claims "have not been appealed".

Criterium has shown at page 2, above, that Criterium appealed all of the district court's orders, not just its final judgment, and that this Court's reversal of the district court would result in a vacation of its attorney fee award, including any fees that it might have awarded to the Building 1 Owners and the Managers.

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[41] *Malan v. Lewis,* 693 P.2d 661, 676 (Utah 1984).

[42] *SIRQ, Inc. v. The Layton Cos.*, 2016 UT 30, ¶ 6, 379 P.3d 1237; *see also, Heartwood Home Health & Hospice LLC v. Huber*, 2016 UT App 183, ¶ 10, 820 Utah Adv. Rep. 25.

[43] *See, id, ¶ 11.*

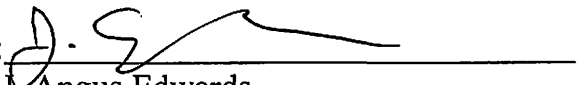
Finally, Criterium has argued In Point I.B. at page 2, above, that there is no apparent reason why Criterium should be liable for common expenses for periods when Appellees excluded Criterium from participation, and Criterium incorporates that argument into this Point VII by this reference.

CONCLUSION

For the foregoing reasons this Court should REVERSE the judgment of the district court and instruct the district court (i) that the Criterium Units are "Units" under both the Act and the Rockwell Square Declaration; (ii) that Criterium is entitled to an allocation of undivided interests in the common areas proportionate to the relative sizes of the Criterium Units, together with corresponding voting rights and membership in the Association; (iii) that Criterium was the prevailing party in the district court on the issues presented in this appeal; and (iv) that Criterium was the prevailing party on appeal; and (v) to determine Criterium's reasonable attorney fees incurred both in the district court action and on this appeal.

DATED: October 28, 2016

JONES, WALDO, HOLBROOK & McDONOUGH, P.C.

By: 

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CERTIFICATE OF COMPLIANCE

I hereby certify that the word processing system used to prepare the foregoing Reply Brief indicates that it contains 5,132 words in the proportionately spaced Times New Roman font, exclusive of (i) cover text, (ii) the table of contents, (iii) the table of citations, (iv) this certificate of compliance and (v) the certificate of service. That word count complies with the 7,000 word type-volume limitation of UTAH RULE OF APPELLATE PROCEDURE 24(f)(1)(A).

DATED: October 28, 2016

JONES, WALDO, HOLBROOK & McDONOUGH, P.C.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 28, 2016 I caused two true and correct copies of the foregoing **REPLY BRIEF** to be mailed, postage prepaid, to:

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